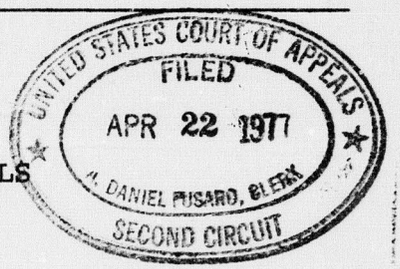
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7110

To be argued by
MARVIN LUBOFF



In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

B P/S

PAN AMERICAN SEAFOOD, INC.,

Plaintiff-Appellant,

vs.

UNITED STATES LINES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF PLAINTIFF-APPELLANT

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Statement of the Issues

I. Did the District Court err in granting summary judgment for Defendant-Appellee and dismissing the Complaint?

II. Did the District Court err in finding that there were no triable issues of fact?

III. Did the District Court err in finding that Plaintiff-Appellant failed to plead and prove a prima facie case?

IV. Did the District Court err in finding that Defendant-Appellee met its burden of proof under the Carriage of Goods By Sea Act, 46 U.S.C.A. §1300, et seq?

It is the contention of Plaintiff-Appellant that these questions should be answered in the affirmative and that the decision below and the judgment entered on that decision should be reversed with costs.

UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-1778

PAN AMERICAN SEAFOOD, INC.,

Plaintiff-Appellant

-against-

UNITED STATES LINES, INC.,

Defendant-Appellee.

On Appeal From the United States District Court For
The Southern District of New York

BRIEF OF PLAINTIFF-APPELLANT

Statement of the Case

A. Preliminary Statement

This brief is submitted in support of the appeal (106a)* of plaintiff-appellant, Pan American Seafood, Inc. ("Pan American") from a judgment (105a) entered in this action on the 28th day of January, 1977, in favor of defendant-appellee,

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* All numerical references followed by the letter "a" refer to the relevant page numbers in the Appendix.

United States Lines, Inc. ("United States Lines") and against Pan American dismissing the complaint on a cross-motion for summary judgment* pursuant to Rule 56 of the Federal Rules of Civil Procedure, based on a memorandum decision of the Hon. VINCENT L. BRODERICK, United States District Judge, dated the 26th day of January, 1977 (102a).

B. Statement of Facts and Proceedings Below

This appeal is based upon the following facts, which are not in dispute. Pan American's supplier had delivered to defendant carrier in Panama cartons of shrimp and lobster on two (2) separate occasions for two (2) separate voyages, one on the SS "AMERICAN ASTRONAUT", Voyage 52, the other on the SS "AMERICAN LYNX", Voyage 56 (6a-16a, 17a-24a, 32a-40a, 54a-63a). In each instance United States Lines supervised the loading of the cartons to be shipped into the containers in which they were shipped and certified that what Pan American claims was shipped, was in fact, loaded into the containers. The containers were packed by the shipper with contemporaneous tally being made by the Agent of United States Lines, the

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* Although no formal notice of cross-motion was served by defendant, request for summary judgment was made in memorandum submitted by defendant in opposition to plaintiff's motion. Defendant also filed statement pursuant to Rule 9(g) of the Southern District Rules.

shipper and the trucker in Panama (6a-16a, 17a-24a, 41a, 42a-50a, 54a-63a, 64a, 65a-74a). The Agent of United States Lines then placed its own padlock on the 40-foot container which had been sealed. Those padlocks were removed immediately before the container was placed aboard the ship or the vessel (89a).

United States Lines then issued clean, on-board bills of lading to Pan American acknowledging receipt of the goods referred to therein in apparent good order and condition without any indication noted thereon to the contrary. Each bill of lading was subject to the provisions of the Carriage of Goods by Sea Act, 1936 ("COGSA"), 46 U.S.C.A. §1300, et seq (32a-40a, 54a-63a).

The containers were discharged at the Howland Hook Container Terminal in Staten Island, New York, where they were inspected by a U.S. Customs Agent, who broke one seal on each container to make each inspection (91a, 96a, 98a). After those inspections, the Customs inspector replaced the broken seal on each container with a new seal. Each container was then taken by a trucker designated by Pan American to a refrigerated warehouse designated by Pan American (9a, 13a, 17a-24a, 51a-52a, 75a, 91a, 96a, 98a).

Immediately upon arrival at the warehouse the containers were opened. As to the first container, which was initially loaded with seven hundred seventy-three (773) cartons of frozen shrimp and thirty-four (34) cartons of frozen lobster tails, it was found that forty-one (41) cartons of shrimp were short off pier (the entire carton missing), twenty-seven (27) cartons of lobster tails were short off pier and one (1) carton of lobster tails was slack off pier (part of the case missing) (9a, 17a-24a, 32a-40a, 41a, 42a-50a, 51a-52a).

As to the second container, which was initially loaded with eight hundred sixteen (816) cartons of shrimp and fifty (50) cartons of lobster, it was found that one (1) carton of shrimp was short off pier and one (1) carton of lobsters was slack off pier (11a, 14a, 17a-24a, 54a-63a, 64a, 65a-74a, 75a).

The refrigeration warehouse receiving reports set forth that the containers were received with seals intact (51a-52a, 75a). However, there is no evidence that the three specific seals affixed on each container at loading were intact and still on those containers when each was presented for Customs inspection at the New York pier.

The seals affixed on the container carrier by the SS "AMERICAN ASTRONAUT" were numbered 05986, 56808 and 06062 (93a, 95a). But, the inspection report, signed by the representative of the trucker upon receipt of the container at the New York pier said to contain the cartons loaded into it, shows that the only old seal affixed to that container upon receipt thereof was number 56806. The only other seal identification noted thereon was seal number 08125, which was affixed by Customs after that container was inspected by Customs (98a). There is, therefore, no evidence concerning the status of the original seals numbered 05986 and 06062 on arrival at the New York pier. Furthermore, the refrigerated company's receiving report for that container indicates that seal number 56806 was no longer on the container (51a-52a).

The seals affixed on the container carried by the SS "AMERICAN LYNX" were numbered 49396, 05905 and 05906 (87a). But, only one of those seals ever appears again on any of the subsequent exhibits. Original seal number 05906 is reflected upon the Customs inspection report, which also shows that after that inspection new seal number 02974 was affixed (91a). Only this new seal number 02974, is recorded as having been affixed to that container on arrival at the refrigerating company (75a).

There is therefore no evidence to show the status of the two (2) original seals, 49396 and 05905, when that container was presented to Customs for inspection at the New York pier.

Due notice of the claimed losses was given to United States Lines (53a, 76a).

The affidavit submitted by United States Lines in support of its cross-motion for summary judgment was made by a claims adjuster who had no personal knowledge of the facts and was merely "assigned to investigate a claim". Most of the Exhibits annexed to that affidavit are letters and telexes to and from United States Lines and its Agent, are self-serving, not in affidavit form and would not have been admissible in evidence in the form in which they were presented (80a-85a, 86a, 87a, 88a, 89a, 92a, 93a, 94a, 95a).

Furthermore, United States Lines' correspondence annexed as exhibits to its supporting affidavit show that United States Lines was confused about the numbering of at least one seal on one container (93a, 94a, 95a).

ARGUMENT

PLAINTIFF-APPELLANT SHIPPER HAS ESTABLISHED A PRIMA FACIE CASE FOR LOST GOODS BY PROOF OF RECEIPT OF THOSE GOODS BY THE DEFENDANT-APPELLEE CARRIER IN GOOD ORDER AND THE SUBSEQUENT FAILURE OF DELIVERY OF THOSE GOODS BY THE CARRIER. DEFENDANT-APPELLEE CARRIER HAS FAILED TO MEET ITS BURDEN OF PROOF AND SHOW IT EXERCISED DUE CARE OF THE CARGO AND WAS NOT NEGLIGENT.

The rights of the parties are governed by COGSA and the Harter Act, 46 USCA §190 et seq., Levatino Co. v. M/S Helvig Torm, 295 F.Supp. 725, 728, 1968, SDNY; COGSA §12, 46 USCA §1311; Gilmore and Black, The Law of Admiralty, §3-25 at 147 (1957).

In Levatino v. M/S Helvig Torm, supra, at page 728, the Court said:

> "COGSA covers the period 'from the time when the goods are loaded on to the time when they are discharged from the ship.' 46 USC §1301(e). The Harter Act is applicable to 'the period between the discharge of cargo from the vessel and its proper delivery.' See also cases cited therein."

COGSA, at 46 USCA §1303(1) provides:

> "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to...
>
> (c) Make the holds, refrigerating and cooling chambers and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation."

at 46 USCA §1303(2), it provides:

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

at 46 USCA §1303(4), it provides:

> "...a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described..."

at 46 USCA §1304(2), it provides:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from...
>
> (q) Any other cause arising without actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Under 46 USCA §1303(1) and (2) of COGSA, the carrier is bound to exercise due diligence to make the ship seaworthy, to make the ship fit and safe for the reception, carriage and preservation of the cargo, and to properly load, handle, stow, and discharge the goods being shipped. Section 46 USCA 1303(4) makes the bill of lading prima facie evidence of the receipt by the carrier of the goods as described in the bill, Demsey & Assocs. v. SS "SEA STAR", 461 F.2d 1009, 1014, (2d Cir. 1972).

Under COGSA, plaintiff shipper establishes a prima facie case by proving receipt by the carrier of the cargo in sound condition and failure by the carrier to deliver it at destination or delivery at destination in a damaged condition. Demsey & Assocs. v. SS "SEA STAR", supra; Interstate Steel Corp. v. SS "CRYSTAL GEM", 317 F.Supp.112 (SDNY 1970); Daido Line v. Thomas P. Gonsalez Corp., 299 F.2d 669 (9th Cir. 1962); Mamiye Bros. v. Barber Steamship Lines, Inc., 241 F.Supp.99 (SDNY 1965), aff'd. 360 F.2d 774 (2d Cir.), cert. denied, 385 US 835, 87 S.Ct. 80, 17 L.Ed.2d 70 (1966); Levatino Co. v. M/S Helvig Torm, supra; American Trading Co., Inc. v. Harry Culbreath, et al, 187 F.2d 310 (2d Cir. 1951); American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449 (2d Cir. 1951); Spencer Kellogg v. Great Lakes Corp., 32 F.Supp. 520 (ED Michigan, 1940). The Fabbri Co., Inc. v. Universal Shipping Corp., 310 F.Supp. 964 (SDNY 1969). Kupfermann v. United States of America, 227 F.2d 348 (2d Cir. 1955).

The carrier has the burden of proof to overcome the prima facie case by proving an "excepted cause", COGSA 46 USCA §1304(2)(a)-(p), or "due diligence", COGSA 46 USCA §1303(1), §1304 (1), The Fabbri Co., Inc. v. Universal Shipping Corp., supra; Caterpillar Overseas SA v. SS "EXPEDITOR", 318 F.2d 720,

724-725 (2d Cir.), cert. denied, American Export Lines v. Caterpillar Overseas, 375 US 942, 84 S.Ct. 347, 11 L.Ed.2d 272 (1963); Isthmian Steamship Co. v. California Spray-Chemical Corp., 290 F.2d 486, 489-490 (9th Cir. 1961); or that it was free from negligence in caring for the cargo before delivery, The Fabbri Co., Inc. v. Universal Shipping Corp., supra, at 967; COGSA 46 USCA §1303(2), §1304(2)(q).

Here, Pan American established a prima facie case by proving receipt by the carrier, United States Lines, of the cargo in sound condition and failure by United States Lines to deliver some of the cargo at its destination. In addition to the clean bills of lading being prima facie evidence of the receipt by United States Lines of the goods therein described, the receipts executed by the shipper, its trucker, as well as United States Lines, together with the dock receipts signed on behalf of United States Lines, confirmed the receipt by them of all the cartons Pan American claims were shipped.

There is not one scintilla of evidence in the record wherein United States Lines has met its burden of proof by showing what happened to the seals on the containers which were missing at the time those containers were discharged at the New

York pier. United States Lines, which had knowledge of the contents of each container and exclusive control of each container for several days prior to the shipment being loaded on board and until the discharge of the containers on the New York pier, has not accounted for that entire period for its care and custody of the cargo, has not explained about the missing seals; has given no evidence of the condition of the containers when each padlock was removed; the number of people engaged in watching the containers during the period from the time the containers were padlocked until the time they were discharged at the New York pier, as well as the method, if any, taken to prevent any tampering with the seals. There is also no evidence to satisfy a reasonable man that the seals were tamper-proof and/or that there was no opportunity for tampering with those seals. Neither is there any proof that the container could not be opened without breaking the seals.

Accordingly, United States Lines having failed to prove an "excepted cause" or that it was not negligent in caring for the cargo before discharge at the New York pier, should not be awarded summary judgment dismissing the action.

The complaint pleads all the elements required by COGSA for the shipper to make out a prima facie case. In addi-

tion, the supporting affidavit of Ronnie D. Koenig, and the exhibits annexed thereto, fully document the allegations of the complaint. United States Lines has presented no proof to rebut Pan American's prima facie case. There are, therefore, triable issues of fact, as described above, which would prevent the granting of summary judgment.

The fact that the refrigerating company reports mentioned that the seals were intact, merely recites the fact that the seals, the numbers of which are noted on those reports, were intact. It is no proof as to what happened to the original seals whose numbers are not recorded on those reports. Indeed, the refrigerating company would have no knowledge as to when and under what circumstances those other seals, not then present, were removed. Therefore, the refrigerating warehouse reports have no bearing on the carrier's duty under COGSA.

The shortage of cartons, as well as the partial shortage from certain cartons, could not have been discovered until the cartons were removed from the containers and counted, cf. discussion of problems of liability in containerization in Bissell, The Operational Realities of Containerization, 45 Tulane L.Rev. 902 (1971), Simon, Latest Developments in the Law of Shipping Containers, 4 Journal of Maritime Law and Commerce, 441

(1973) including a discussion of the cases Leathers Best v. SS "MORMACLYNX", 451 F.2d 800 (2d Cir.) and Royal Typewriter v. M/V Kulmerland, 346 F.Supp. 1019, aff'd. 483 F.2d 645 (2d Cir.) which concerned the problems of applying concepts of law enacted when cargo was carried by break-bulk to situations where cargo was carried by container. There, the issue was damage assessment to unit carried, i.e., whether the unit was the carton or the container. Here, the issue is discovering a shortage of or damage to cartons, given the fact that the containers are not opened on the pier, at point of discharge. Accordingly, assuming arguendo that all seals were intact, when the containers reached the refrigerated warehouse where they were first opened and where the count was first made, it would still be incumbent upon the carrier to meet its burden under COGSA and prove what care was given from loading to discharge at the New York pier; that the seals were tamper-proof; that no one reasonably had an opportunity to tamper with those seals or with the containers themselves, that the carrier took due care of the cargo and was not negligent. The bald assertion that a container was delivered to the New York pier with a seal intact is insufficient to meet that burden.

Accordingly, the finding of the Court that "the goods had been packed in cartons by the plaintiff" is contradicted by the record. Here, it is not disputed that they were packed by the shipper with a contemporaneous tally being made by the Agent of United States Lines, the shipper and the trucker in Panama. Thereafter, United States Lines' Agent placed its own padlock on the containers which had been sealed. That padlock was removed immediately before the container was put aboard the ship. The record, as previously discussed, also contradicts the Court's finding that the containers "arrived in New York with the seals intact". Again, there is no evidence that the specific seals affixed at loading were intact and still on the containers when they were discharged by the United States Lines on the New York pier and presented for Customs inspection. Since the seals mentioned on the inspection reports do not correspond with the seals admittedly affixed at the time of loading, the Court could not have properly concluded that the containers arrived with the seals intact.

The conclusion of the Court that the carrier received "a sealed container" presumably with no knowledge of the contents is not borne out by the carrier's tally or by the bills of lading which are not marked "shippers load and count". There is

no denial by the carrier that the full load and count was received nor is there any evidence that the count and load, as recited in the bills of lading, or in the tally and receipt signed on behalf of the carrier which issued the bills of lading, was not in fact received by or on behalf of the carrier.

Finally, the Court's finding that "there was no negligence by the defendant, and no loss of goods established by plaintiff" is clearly erroneous. All the exhibits annexed to the plaintiff's motion papers, the carrier's affidavit submitted in support of the cross-motion for summary judgment to dismiss the complaint, and the exhibits annexed thereto, clearly and unequivocably establish that the shipper established a prima facie case and showed a loss of cartons and partial loss of others and that the carrier failed to prove itself free from negligence and failed to show that it exercised due care of the cargo. In addition to being erroneous, this finding incorrectly shifted the carrier's burden to show itself free from negligence to the plaintiff to affirmatively establish negligence, which is in contradiction to COGSA and the cases interpreting COGSA.

In determining a motion for summary judgment, the fundamental maxim is that the court cannot try issues of fact;

it can only determine whether there are issues to be tried. Moreover, when considering such a motion, the court must resolve all ambiguities and draw all reasonable inference in favor of the party against whom summary judgment is sought with the burden on the moving party to demonstrate the absence of any material, factual issue genuinely in dispute. The foregoing requirements are appropriate because the procedural weapon of summary judgment is a drastic device since its prophylactic function, when exercised, cuts off the party's right to present his case to the jury. Heyman v. Commerce Industry Insurance Co., 524 F.2d 1317, 1319-1320 (2d Cir., 1975); Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972).

It is abundantly clear that there were triable issues of fact on the motion for summary judgment before the Court below. In determining the motion and dismissing the complaint, the Court concluded that there were no such issues and based its dismissal on findings, some of which are contradicted in the record. If summary judgment is warranted, it should have been granted in favor of plaintiff by reason of the defendant's failure to meet the burden imposed on it by COGSA. Furthermore, all ambiguities and all reasonable inferences were drawn in favor of the party making the motion and not in favor of Pan American, the party against whom summary judgment was sought. The moving party

failed to meet its burden of demonstrating the absence of any material, factual issue genuinely in dispute. Accordingly, the granting of summary judgment dismissing the complaint was improper.

CONCLUSION

The memorandum order granting defendant-appellee's cross-motion dismissing the complaint and the judgment entered on that order dismissing the complaint should be reversed.

Dated: New York, New York
April 21, 1977

Respectfully submitted,

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